

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JESSE MANN,

Plaintiff,

v.

DR. C. LEE, et al.,

Defendants.

) No. C 07-0781 MMC (PR)

) **ORDER DIRECTING CLERK TO**
) **REISSUE SUMMONS AND MARSHAL**
) **TO SERVE DEFENDANTS; DENYING**
) **MOTION FOR APPOINTMENT OF**
) **COUNSEL**

) **(Docket No. 10)**

On February 6, 2007, plaintiff, a California prisoner currently incarcerated at Salinas Valley State Prison ("SVSP") and proceeding pro se, filed the above-titled civil rights action under 42 U.S.C. § 1983 against various SVSP employees. On May 29, 2007, the Court found the complaint stated a cognizable claim against defendants Dr. Charles Lee, Dr. Bowman and Dr. Milner for deliberate indifference to plaintiff's serious medical needs. The Court directed the United States Marshal to serve defendants at SVSP, where plaintiff indicated they were located. On June 15, 2007, the Marshal mailed the summons and complaint to defendants; on October 31, 2007, the Marshal returned the summons unexecuted as to each of said defendants, for the reason that no acknowledgment of service had been received from any defendant as of that date.

In cases wherein the plaintiff proceeds in forma pauperis, the "officers of the court shall issue and serve all process." 28 U.S.C. § 1915(d). The court must appoint the Marshal to effect service, see Fed. R. Civ. P. 4(c)(2), and the Marshal, upon order of the court, must serve the summons and the complaint, see Walker v. Sumner, 14 F.3d 1415, 1422 (9th Cir. 1994). Although a plaintiff who is incarcerated and proceeding in forma pauperis may rely

1 on service by the Marshal, such plaintiff “may not remain silent and do nothing to effectuate
2 such service”; rather, “[a]t a minimum, a plaintiff should request service upon the appropriate
3 defendant and attempt to remedy any apparent defects of which [he] has knowledge.”

4 Rochon v. Dawson, 828 F.2d 1107, 1110 (5th Cir. 1987).

5 Here, plaintiff’s complaint has been pending for over 120 days, and thus, absent a
6 showing of “good cause,” is subject to dismissal without prejudice as to the unserved
7 defendants. See Fed. R. Civ. P. 4(m). Because it is not clear from the unexecuted summons
8 returned by the Marshal whether the information provided by plaintiff was sufficient to allow
9 the Marshal to locate and serve the defendants, however, the Court finds good cause exists to
10 direct the Marshal to make one further attempt to effectuate service. If the Marshal’s
11 renewed attempt to serve defendants is unsuccessful, plaintiff will be ordered to remedy the
12 situation, either by effecting service himself or by providing the Court with an accurate
13 current location such that the Marshal is able to effect such service; plaintiff’s failure to do so
14 will result in dismissal of his claims against defendants. See Walker v. Sumner, 14 F.3d at
15 1421-22 (holding claim against prison official subject to dismissal under Rule 4(m) where
16 prisoner failed to show he provided Marshal with sufficient information to effectuate
17 service).

18 Plaintiff has filed a motion for the appointment of counsel. There is no constitutional
19 right to counsel in a civil case such as this. See Lassiter v. Dep’t of Social Services, 452 U.S.
20 18, 25 (1981). Rather, pursuant to 28 U.S.C. § 1915, a district court has the power to
21 “request” that counsel represent a litigant who is proceeding in forma pauperis. 28 U.S.C.
22 § 1915(e)(1). To date, plaintiff has been able to present his claims in an adequate manner
23 and there are no exceptional circumstances warranting appointment of counsel at this time.
24 Accordingly, plaintiff’s motion will be denied. Should the circumstances of the case
25 materially change, the Court may reconsider plaintiff’s request sua sponte.

26 CONCLUSION

27 For the reasons stated above, the Court orders as follows:

28 1. Plaintiff’s motion for the appointment of counsel is hereby DENIED. (Docket No.

1 10.)

2 2. The Clerk of the Court shall reissue summons and the United States Marshal shall
3 serve, without prepayment of fees, a copy of the complaint in this matter, all attachments
4 thereto, and a copy of this order upon **Health Care Manager Dr. Charles Lee, Dr.**
5 **Bowman and Dr. Milner at Salinas Valley State Prison.** The Clerk shall also mail a
6 courtesy copy of this order to the California Attorney General's Office.

7 3. Within **ninety (90)** days of the date this order is filed, defendants shall file a
8 motion for summary judgment or other dispositive motion with respect to the claims found to
9 be cognizable above.

10 a. If defendants elect to file a motion to dismiss on the grounds plaintiff failed
11 to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
12 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune,
13 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v. Terhune, 540 U.S. 810
14 (2003).

15 b. Any motion for summary judgment shall be supported by adequate factual
16 documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil
17 Procedure. **Defendants are advised that summary judgment cannot be granted, nor**
18 **qualified immunity found, if material facts are in dispute. If any defendant is of the**
19 **opinion that this case cannot be resolved by summary judgment, he shall so inform the**
20 **Court prior to the date the summary judgment motion is due.**

21 4. Plaintiff's opposition to the dispositive motion shall be filed with the Court and
22 served on defendants no later than **thirty (30)** days from the date defendants' motion is filed.

23 a. In the event the defendants file an unenumerated motion to dismiss under
24 Rule 12(b), plaintiff is hereby cautioned as follows:¹

25 The defendants have made a motion to dismiss pursuant to Rule 12(b) of
26 the Federal Rules of Civil Procedure, on the ground you have not exhausted

27 ¹The following notice is adapted from the summary judgment notice to be given to pro
28 se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).
See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

your administrative remedies. The motion will, if granted, result in the dismissal of your case. When a party you are suing makes a motion to dismiss for failure to exhaust, and that motion is properly supported by declarations (or other sworn testimony) and/or documents, you may not simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or documents, that contradict the facts shown in the defendant's declarations and documents and show that you have in fact exhausted your claims. If you do not submit your own evidence in opposition, the motion to dismiss, if appropriate, may be granted and the case dismissed.

b. In the event defendants file a motion for summary judgment, the Ninth Circuit has held that the following notice should be given to plaintiffs:

The defendants have made a motion for summary judgment by which they seek to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendants' declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted in favor of defendants, your case will be dismissed and there will be no trial.

See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party opposing summary judgment must come forward with evidence showing triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that failure to file an opposition to defendants' motion for summary judgment may be deemed to be a consent by plaintiff to the granting of the motion, and granting of judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

5. Defendants shall file a reply brief no later than **fifteen (15)** days after plaintiff's opposition is filed.

6. The motion shall be deemed submitted as of the date the reply brief is due. No

1 hearing will be held on the motion unless the Court so orders at a later date.

2 7. All communications by the plaintiff with the Court must be served on defendants,
3 or defendants' counsel once counsel has been designated, by mailing a true copy of the
4 document to defendants or defendants' counsel.

5 8. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
6 No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is
7 required before the parties may conduct discovery.


8 9. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court
9 informed of any change of address and must comply with the court's orders in a timely
10 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
11 pursuant to Federal Rule of Civil Procedure 41(b).

12 10. Any motion for an extension of time must be filed no later than the deadline
13 sought to be extended and must be accompanied by a showing of good cause.

14 This order terminates Docket No. 10.

15 IT IS SO ORDERED.

16 DATED: May 9, 2008

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MAXINE M. CHESNEY
18 United States District Judge
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